

106TH CONGRESS  
1ST SESSION

# S. 186

To provide for the reorganization of the Ninth Circuit Court of Appeals,  
and for other purposes.

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IN THE SENATE OF THE UNITED STATES

JANUARY 19, 1999

Mr. MURKOWSKI (for himself and Mr. GORTON) introduced the following bill;  
which was read twice and referred to the Committee on the Judiciary

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## A BILL

To provide for the reorganization of the Ninth Circuit Court  
of Appeals, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Federal Ninth Circuit  
5       Reorganization Act of 1999”.

6       **SEC. 2. DIVISIONAL ORGANIZATION OF THE COURT OF AP-**  
7       **PEALS FOR THE NINTH CIRCUIT.**

8       (a) REGIONAL DIVISIONS.—Effective 180 days after  
9       the date of enactment of this Act, the United States Court  
10      of Appeals for the Ninth Circuit shall be organized into

1 3 regional divisions designated as the Northern Division,  
 2 the Middle Division, and the Southern Division, and a  
 3 nonregional division designated as the Circuit Division.

4 (b) REVIEW OF DECISIONS.—

5 (1) NONAPPLICATION OF SECTION 1294.—Sec-  
 6 tion 1294 of title 28, United States Code, shall not  
 7 apply to the Ninth Circuit Court of Appeals. The re-  
 8 view of district court decisions shall be governed as  
 9 provided in this subsection.

10 (2) REVIEW.—Except as provided in sections  
 11 1292(c), 1292(d), and 1295 of title 28, United  
 12 States Code, once the court is organized into divi-  
 13 sions, appeals from reviewable decisions of the dis-  
 14 trict and territorial courts located within the Ninth  
 15 Circuit shall be taken to the regional divisions of the  
 16 Ninth Circuit Court of Appeals as follows:

17 (A) Appeals from the districts of Alaska,  
 18 Guam, Hawaii, Idaho, Montana, the Northern  
 19 Mariana Islands, Oregon, Eastern Washington,  
 20 and Western Washington shall be taken to the  
 21 Northern Division.

22 (B) Appeals from the districts of Eastern  
 23 California, Northern California, and Nevada  
 24 shall be taken to the Middle Division.

1 (C) Appeals from the districts of Arizona,  
2 Central California, and Southern California  
3 shall be taken to the Southern Division.

4 (D) Appeals from the Tax Court, petitions  
5 to enforce the orders of administrative agencies,  
6 and other proceedings within the court of ap-  
7 peals' jurisdiction that do not involve review of  
8 district court actions shall be filed in the court  
9 of appeals and assigned to the division that  
10 would have jurisdiction over the matter if the  
11 division were a separate court of appeals.

12 (3) ASSIGNMENT OF JUDGES.—Each regional  
13 division shall include from 7 to 11 judges of the  
14 court of appeals in active status. A majority of the  
15 judges assigned to each division shall reside within  
16 the judicial districts that are within the division's ju-  
17 risdiction as specified in paragraph (2). Judges in  
18 senior status may be assigned to regional divisions  
19 in accordance with policies adopted by the court of  
20 appeals. Any judge assigned to 1 division may be as-  
21 signed by the chief judge of the circuit for tem-  
22 porary duty in another division as necessary to en-  
23 able the divisions to function effectively.

24 (4) PRESIDING JUDGES.—Section 45 of title  
25 28, United States Code, shall govern the designation

1 of the presiding judge of each regional division as  
 2 though the division were a court of appeals, except  
 3 that the judge serving as chief judge of the circuit  
 4 may not at the same time serve as presiding judge  
 5 of a regional division, and that only judges resident  
 6 within, and assigned to, the division shall be eligible  
 7 to serve as presiding judge of that division.

8 (5) PANELS.—Panels of a division may sit to  
 9 hear and decide cases at any place within the judi-  
 10 cial districts of the division, as specified by a major-  
 11 ity of the judges of the division. The divisions shall  
 12 be governed by the Federal Rules of Appellate Pro-  
 13 cedure and by local rules and internal operating pro-  
 14 cedures adopted by the court of appeals. The divi-  
 15 sions may not adopt their own local rules or internal  
 16 operating procedures. The decisions of 1 regional di-  
 17 vision shall not be regarded as binding precedents in  
 18 the other regional divisions.

19 (c) CIRCUIT DIVISION.—

20 (1) IN GENERAL.—In addition to the 3 regional  
 21 divisions specified under subsection (a), the Ninth  
 22 Circuit Court of Appeals shall establish a Circuit Di-  
 23 vision composed of the chief judge of the circuit and  
 24 12 other circuit judges in active status, chosen by lot  
 25 in equal numbers from each regional division. Ex-

1       cept for the chief judge of the circuit, who shall  
2       serve ex officio, judges on the Circuit Division shall  
3       serve nonrenewable, staggered terms of 3 years each.  
4       One-third of the judges initially selected by lot shall  
5       serve terms of 1 year each, one-third shall serve  
6       terms of 2 years each, and one-third shall serve  
7       terms of 3 years each. Thereafter all judges shall  
8       serve terms of 3 years each. If a judge on the Cir-  
9       cuit Division is disqualified or otherwise unable to  
10      serve in a particular case, the presiding judge of the  
11      regional division to which that judge is assigned  
12      shall randomly select a judge from the division to  
13      serve in the place of the unavailable judge.

14           (2) JURISDICTION.—The Circuit Division shall  
15      have jurisdiction to review, and to affirm, reverse, or  
16      modify any final decision rendered in any of the  
17      court's divisions that conflicts on an issue of law  
18      with a decision in another division of the court. The  
19      exercise of such jurisdiction shall be within the dis-  
20      cretion of the Circuit Division and may be invoked  
21      by application for review by a party to the case, set-  
22      ting forth succinctly the issue of law as to which  
23      there is a conflict in the decisions of 2 or more divi-  
24      sions. The Circuit Division may review the decision  
25      of a panel within a division only if en banc review

1 of the decision has been sought and denied by the  
2 division.

3 (3) PROCEDURES.—The Circuit Division shall  
4 consider and decide cases through procedures adopt-  
5 ed by the court of appeals for the expeditious and  
6 inexpensive conduct of the division’s business. The  
7 Circuit Division shall not function through panels.  
8 The Circuit Division shall decide issues of law on the  
9 basis of the opinions, briefs, and records in the con-  
10 flicting decisions under review, unless the Circuit Di-  
11 vision determines that special circumstances make  
12 additional briefing or oral argument necessary.

13 (4) EN BANC PROCEEDINGS.—Section 46 of  
14 title 28, United States Code, shall apply to each re-  
15 gional division of the Ninth Circuit Court of Appeals  
16 as though the division were the court of appeals.  
17 Section 46(c) of title 28, United States Code, au-  
18 thorizing hearings or rehearings en banc, shall be  
19 applicable only to the regional divisions of the court  
20 and not to the court of appeals as a whole. After a  
21 divisional plan is in effect, the court of appeals shall  
22 not order any hearing or rehearing en banc, and the  
23 authorization for a limited en banc procedure under  
24 section 6 of Public Law 95–486 (92 Stat. 1633),  
25 shall not apply to the Ninth Circuit. An en banc pro-

ceeding ordered before the divisional plan is in effect  
may be heard and determined in accordance with ap-  
plicable rules of appellate procedure.

(d) CLERKS AND EMPLOYEES.—Section 711 of title  
28, United States Code, shall apply to the Ninth Circuit  
Court of Appeals, except the clerk of the Ninth Circuit  
Court of Appeals may maintain an office or offices in each  
regional division of the court to provide services of the  
clerk's office for that division.

(e) STUDY OF EFFECTIVENESS.—The Federal Judi-  
cial Center shall conduct a study of the effectiveness and  
efficiency of the divisions in the Ninth Circuit Court of  
Appeals. No later than 3 years after the effective date of  
this Act, the Federal Judicial Center shall submit to the  
Judicial Conference of the United States a report summa-  
rizing the activities of the divisions, including the Circuit  
Division, and evaluating the effectiveness and efficiency  
of the divisional structure. The Judicial Conference shall  
submit recommendations to Congress concerning the divi-  
sional structure and whether the structure should be con-  
tinued with or without modification.

**SEC. 2. ASSIGNMENT OF JUDGES; PANELS; EN BANC PRO-  
CEEDINGS; DIVISIONS; QUORUM.**

(a) IN GENERAL.—Section 46 of title 28, United  
States Code, is amended to read as follows:

1   **“§ 46. Assignment of judges; panels; en banc proceed-**  
2                   **ings; divisions; quorum**

3           “(a) Circuit judges shall sit on the court of appeals  
4 and its panels in such order and at such times as the court  
5 directs.

6           “(b) Unless otherwise provided by rule of court, a  
7 court of appeals or any regional division thereof shall con-  
8 sider and decide cases and controversies through panels  
9 of 3 judges, at least 2 of whom shall be judges of the  
10 court, unless such judges cannot sit because recused or  
11 disqualified, or unless the chief judge of that court cer-  
12 tifies that there is an emergency including, but not limited  
13 to, the unavailability of a judge of the court because of  
14 illness. A court may provide by rule for the disposition  
15 of appeals through panels consisting of 2 judges, both of  
16 whom shall be judges of the court. Panels of the court  
17 shall sit at times and places and hear the cases and con-  
18 troversies assigned as the court directs. The United States  
19 Court of Appeals for the Federal Circuit shall determine  
20 by rule a procedure for the rotation of judges from panel-  
21 to-panel to ensure that all of the judges sit on a represent-  
22 ative cross section of the cases heard and, notwithstanding  
23 the first sentence of this subsection, may determine by  
24 rule the number of judges, not less than 2, who constitute  
25 a panel.



1       “(c) Notwithstanding subsection (b), a majority of  
2 the judges of a court of appeals not organized into divi-  
3 sions as provided in subsection (d) who are in regular ac-  
4 tive service may order a hearing or rehearing before the  
5 court en banc. A court en banc shall consist of all circuit  
6 judges in regular active service, except that any senior cir-  
7 cuit judge of the circuit shall be eligible to participate,  
8 at that judge’s election and upon designation and assign-  
9 ment pursuant to section 294(c) and the rules of the cir-  
10 cuit, as a member of an en banc court reviewing a decision  
11 of a panel of which such judge was a member.

12       “(d)(1) A court of appeals having more than 15 au-  
13 thorized judgeships may organize itself into 2 or more ad-  
14 judicative divisions, with each judge of the court assigned  
15 to a specific division, either for a specified term of years  
16 or indefinitely. The court’s docket shall be allocated  
17 among the divisions in accordance with a plan adopted by  
18 the court, and each division shall have exclusive appellate  
19 jurisdiction over the appeals assigned to it. The presiding  
20 judge of each division shall be determined from among the  
21 judges of the division in active status as though the divi-  
22 sion were the court of appeals, except the chief judge of  
23 the circuit shall not serve at the same time as the presid-  
24 ing judge of a division.

1       “(2) When organizing itself into divisions, a court of  
2 appeals shall establish a circuit division, consisting of the  
3 chief judge and additional circuit judges in active status,  
4 selected in accordance with rules adopted by the court, so  
5 as to make an odd number of judges but not more than  
6 13.

7       “(3) The circuit division shall have jurisdiction to re-  
8 view, and to affirm, reverse, or modify any final decision  
9 rendered in any of the court’s divisions that conflicts on  
10 an issue of law with a decision in another division of the  
11 court. The exercise of such jurisdiction shall be within the  
12 discretion of the circuit division and may be invoked by  
13 application for review by a party to the case, setting forth  
14 succinctly the issue of law as to which there is a conflict  
15 in the decisions of 2 or more divisions. The circuit division  
16 may review the decision of a panel within a division only  
17 if en banc review of the decision has been sought and de-  
18 nied by the division.

19       “(4) The circuit division shall consider and decide  
20 cases through procedures adopted by the court of appeals  
21 for the expeditious and inexpensive conduct of the circuit  
22 division’s business. The circuit division shall not function  
23 through panels. The circuit division shall decide issues of  
24 law on the basis of the opinions, briefs, and records in  
25 the conflicting decisions under review, unless the division

1 determines that special circumstances make additional  
2 briefing or oral argument necessary.

3       “(e) This section shall apply to each division of a  
4 court that is organized into divisions as though the divi-  
5 sion were the court of appeals. Subsection (c), authorizing  
6 hearings or rehearings en banc, shall be applicable only  
7 to the divisions of the court and not to the court of appeals  
8 as a whole, and the authorization for a limited en banc  
9 procedure under section 6 of Public Law 95–486 (92 Stat.  
10 1633), shall not apply in that court. After a divisional plan  
11 is in effect, the court of appeals shall not order any hear-  
12 ing or rehearing en banc, but an en banc proceeding al-  
13 ready ordered may be heard and determined in accordance  
14 with applicable rules of appellate procedure.

15       “(f) A majority of the number of judges authorized  
16 to constitute a court, a division, or a panel thereof shall  
17 constitute a quorum.”.

18       (b) TECHNICAL AND CONFORMING AMENDMENT.—  
19 The table of sections for chapter 3 of title 28, United  
20 States Code, is amended by amending the item relating  
21 to section 46 to read as follows:

“46. Assignment of judges; panels; en banc proceedings; divisions; quorum.”.

22       (c) MONITORING IMPLEMENTATION.—The Federal  
23 Judicial Center shall monitor the implementation of sec-  
24 tion 46 of title 28, United States Code (as amended by  
25 this section) for 3 years following the date of enactment

1 of this Act and report to the Judicial Conference such in-  
 2 formation as the Center determines relevant or that the  
 3 Conference requests to enable the Judicial Conference to  
 4 assess the effectiveness and efficiency of this section.

5 **SEC. 3. DISTRICT COURT APPELLATE PANELS.**

6 (a) IN GENERAL.—Chapter 5 of title 28, United  
 7 States Code, is amended by adding after section 144 the  
 8 following:

9 **“§ 145. District Court Appellate Panels**

10 “(a) The judicial council of each circuit may establish  
 11 a district court appellate panel service composed of district  
 12 judges of the circuit, in either active or senior status, who  
 13 are assigned by the judicial council to hear and determine  
 14 appeals in accordance with subsection (b). Judges as-  
 15 signed to the district court appellate panel service may  
 16 continue to perform other judicial duties.

17 “(b) An appeal heard under this section shall be  
 18 heard by a panel composed of 2 district judges assigned  
 19 to the district court appellate panel service, and 1 circuit  
 20 judge as designated by the chief judge of the circuit. The  
 21 circuit judge shall preside. A district judge serving on an  
 22 appellate panel shall not participate in the review of deci-  
 23 sions of the district court to which the judge has been ap-  
 24 pointed. The clerk of the court of appeals shall serve as  
 25 the clerk of the district court appellate panels. A district

1 court appellate panel may sit at any place within the cir-  
2 cuit, pursuant to rules promulgated by the judicial council,  
3 to hear and decide cases, for the convenience of parties  
4 and counsel.

5 “(c) In establishing a district court appellate panel  
6 service, the judicial council shall specify the categories or  
7 types of cases over which district court appellate panels  
8 shall have appellate jurisdiction. In such cases specified  
9 by the judicial council as appropriate for assignment to  
10 district court appellate panels, and notwithstanding sec-  
11 tions 1291 and 1292, the appellate panel shall have exclu-  
12 sive jurisdiction over district court decisions and may exer-  
13 cise all of the authority otherwise vested in the court of  
14 appeals under sections 1291, 1292, 1651, and 2106. A  
15 district court appellate panel may transfer a case within  
16 its jurisdiction to the court of appeals if the panel deter-  
17 mines that disposition of the case involves a question of  
18 law that should be determined by the court of appeals.  
19 The court of appeals shall thereupon assume jurisdiction  
20 over the case for all purposes.

21 “(d) Final decisions of district court appellate panels  
22 may be reviewed by the court of appeals, in its discretion.  
23 A party seeking review shall file a petition for leave to  
24 appeal in the court of appeals, which that court may grant  
25 or deny in its discretion. If a court of appeals is organized

1 into adjudicative divisions, review of a district court appel-  
 2 late panel decision shall be in the division to which an ap-  
 3 peal would have been taken from the district court had  
 4 there been no district court appellate panel.

5 “(e) Procedures governing review in district court ap-  
 6 pellate panels and the discretionary review of such panels  
 7 in the court of appeals shall be in accordance with rules  
 8 promulgated by the court of appeals.

9 “(f) After a judicial council of a circuit makes an  
 10 order establishing a district court appellate panel service,  
 11 the chief judge of the circuit may request the Chief Justice  
 12 of the United States to assign 1 or more district judges  
 13 from another circuit to serve on a district court appellate  
 14 panel, if the chief judge determines there is a need for  
 15 such judges. The Chief Justice may thereupon designate  
 16 and assign such judges for this purpose.”.

17 (b) TECHNICAL AND CONFORMING AMENDMENT.—  
 18 The table of sections for chapter 5 of title 28, United  
 19 States Code, is amended by adding after the item relating  
 20 to section 144 the following:

“145. District court appellate panels.”.

21 (c) MONITORING IMPLEMENTATION.—The Federal  
 22 Judicial Center shall monitor the implementation of sec-  
 23 tion 145 of title 28, United States Code (as added by this  
 24 section) for 3 years following the date of enactment of this  
 25 Act and report to the Judicial Conference such informa-

1 tion as the Center determines relevant or that the Con-  
2 ference requests to enable the Conference to assess the  
3 effectiveness and efficiency of this section.

